UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RENEE M. LEWIS,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 04-62-B-W***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff, who alleges that she is disabled by fibromyalgia, depression, anxiety, gastritis, acid reflux, bilateral carpal tunnel syndrome/tendonitis and back and knee pain, is capable of returning to past relevant work as a fish packer. I recommend that the decision of the commissioner be vacated and the case remanded for further development.

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 19, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the medical evidence established that the plaintiff had fibromyalgia, an impairment that was severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record at 21; that her statements concerning her impairments and their impact on her ability to work were not entirely credible, Finding 4, *id*.; that she lacked the residual functional capacity ("RFC") to lift and carry more than twenty pounds occasionally and ten pounds frequently, Finding 5, *id*.; that her past work as a fish packer, as she generally performed it, was within her RFC and did not require the performance of work functions precluded by her combined medically determinable impairments, Findings 6-8, *id*.; and that she therefore had not been under a disability at any time through the date of decision, Finding 9, *id*.[2] The Appeals Council declined to review the decision, *id*. at 6-8, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

[2] Inasmuch as the plaintiff had acquired sufficient quarters of coverage to remain insured for purposes of SSD through at *(continued on next page)*

The administrative law judge in this case reached Step 4 of the sequential process, at which stage the claimant bears the burden of proof of demonstrating inability to return to past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). At this step the commissioner must make findings of the plaintiff's RFC and the physical and mental demands of past work and determine whether the plaintiff's RFC would permit performance of that work. 20 C.F.R. §§ 404.1520(e), 416.920(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service* Rulings 1975-1982 ("SSR 82-62"), at 813.

The plaintiff complains that the administrative law judge erred in (i) failing to take into account the cumulative effect of all of her impairments, (ii) determining that she retained the RFC to return to her past work as a fish packer despite a complete lack of evidence that she retains the ability to stand for eight hours in an eight-hour workday, (iii) determining that her mental impairment imposed no RFC restriction in the face of substantial evidence to the contrary, (iv) giving more weight to a physical RFC evaluation by a non-examining Disability Determination Services ("DDS") consultant than to one from an examining DDS consultant, and (v) making flawed credibility and pain determinations. *See generally* Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 10).[3] On the basis of the second point – which highlights a serious flaw in determination of physical RFC – reversal and remand is warranted. For the benefit of the parties on remand, I briefly comment on the remaining points, none of which has merit.

I. Discussion

A. Physical RFC

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least March 31, 2005, *see* Finding 1, Record at 21, there was no need to undertake a separate SSD analysis.

[3] At oral argument, counsel for the plaintiff waived an additional assertion made in her Statement of Errors: that the administrative law judge wrongly declined even to consider an RFC evaluation from a treating chiropractor. *See* Statement of Errors at 6-7.

To be deemed capable of returning to past relevant work, a claimant must retain the RFC to perform either "the actual functional demands and job duties of a particular past relevant job" or, "when the demands of the particular job which claimant performed in the past cannot be met, . . . the functional demands of that occupation as customarily required in the national economy[.]" *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 & n.1 (1st Cir. 1991) (citations and internal quotation marks omitted); *see also, e.g.*, SSR 82-62, at 811.

The administrative law judge found that the plaintiff could return to past relevant work as a fish packer as she actually performed it. *See* Finding 6, Record at 21. Inasmuch as appears, she could not have returned to that work as generally performed in the national economy, vocational expert Yvonne Batson having testified at hearing that it is listed in the Dictionary of Occupational Titles as "heavy" work. *See id*. at 56.

The only evidence of record concerning the nature of the fish-packer job as the plaintiff actually performed it is her own documentation, in which she consistently states that she stood for eight hours in a workday. *See, e.g., id*. at 135, 145, 147-48, 172, 184. In addition, on cross-examination at hearing, Batson acknowledged that the job "would require the ability just by virtue of its definition to be on your feet more than six hours a day, five days a week[.]" *Id*. at 57.

As the plaintiff points out, there is no affirmative evidence of record that she is capable of standing for eight hours in an eight-hour workday. *See* Statement of Errors at 6 & n.1. The RFC evaluation of DDS non-examining physician Richard Chamberlin, M.D., on which the administrative law judge expressly relied, *see* Record at 20, deemed her capable of standing and/or walking (with normal breaks) for a total of about six hours in an eight-hour workday, *see id*. at 363.

At oral argument, counsel for the plaintiff posited that inasmuch as there is no affirmative evidence that she can stand for eight hours straight, the administrative law judge's Step 4 finding is unsupported by substantial evidence. By contrast, counsel for the commissioner argued that inasmuch as there is no affirmative evidence that the plaintiff cannot stand for eight hours straight, the plaintiff failed to meet her Step 4 burden to show that she cannot return to past relevant work.

Under these circumstances, counsel for the plaintiff has the better of the argument. "Although the claimant has the burden of proving that he no longer has the residual functional capacity to do his past work . . ., the ALJ's finding on the issue must be supported by substantial evidence." *Mardukhayev v. Commissioner of Soc. Sec.*, 79 Soc. Sec. Rep. Serv. 552, 556 (E.D.N.Y. 2002) (citation and internal quotation marks omitted). As the First Circuit has explained:

> At step four the initial burden is on the claimant to show that she can no longer perform her former work because of her impairments. This initial burden requires the claimant to lay the foundation as to what activities her former work entailed, and to point out (unless obvious) – so as to put in issue – how her functional incapacity renders her unable to perform her former usual work. Once a claimant meets this initial burden, the ALJ must compare the physical and mental demands of the claimant's past work with current functional capability.

Roberts v. Barnhart, 67 Fed. Appx. 621, 622 (1st Cir. 2003) (citations and internal punctuation omitted). What is more, "[a]n ALJ may determine RFC only if the evidence suggests a relatively mild impairment posing, to the layperson's eye, no significant restrictions." *Id*. at 623 (citation and internal punctuation omitted). Otherwise, the administrative law judge must enlist the aid of a medical expert to craft an RFC. *See id*. at 622-23.

The plaintiff in this case satisfied her "initial burden" to place her ability to stand for lengthy periods of time in issue. She adduced evidence that she suffers from fibromyalgia, *see* Finding 3, Record at 21, laid the foundation as to what activities her former work entailed, and testified at hearing that she could stand for

probably fifteen or twenty minutes on a good day, *see id*. at 45. The administrative law judge therefore was obliged, with the aid of expert assistance, to craft an RFC. He did so; however, the medical expert upon whom he relied found the plaintiff capable of standing only for about six hours in an eight-hour day – not all day long. As a simple mathematical proposition, a capacity to stand with breaks for six hours in an eight-hour workday does not translate into a capacity to stand the entire day. The Step 4 finding accordingly is unsupported by substantial evidence of record, warranting reversal and remand of this case.

B. Other Points

For the benefit of the parties on remand, I briefly discuss the plaintiff's remaining points of error, none of which I find has merit.

1. **Mental Impairments**. The administrative law judge found the plaintiff's depression and anxiety to be non-severe and to have no discernible impact on her RFC. *See id*. at 15-16, 19. As counsel for the commissioner noted at oral argument, the Record contains conflicting evidence of the severity of the plaintiff's mental impairments. *Compare, e.g., id*. at 227-34 (Psychiatric Review Technique Form ("PRTF") completed on August 16, 2000 by S. Hoch, Ph.D. finding no severe mental impairment) *with id.* at 282-87 (PRTF completed on September 16, 2002 by Thomas A. Knox, Ph.D., finding severe mental impairment), 370-83 (PRTF completed on December 2, 2002 by David R. Houston, Ph.D., finding severe mental impairment). Drs. Knox and Houston had the benefit of the report of an examination by a third DDS consultant, Edward P. Quinn, Ph.D., while Dr. Hoch did not. *See* Record at 278-81 (report of Dr. Quinn dated August 22, 2002). This circumstance arguably lessens the weight to which the Hoch PRTF is entitled. *See, e.g., Quintana v. Commissioner of Soc. Sec*., 110 Fed. Appx. 142, 144 (1st Cir. 2004) (greater reliance on reports of non-examining, non-testifying consultants is warranted when those consultants

review the reports of examining and treating doctors and support their conclusions with reference to medical findings).

Nonetheless, in this case the administrative law judge carefully buttressed his finding of non-severity with his own parsing of the report of Dr. Quinn and his consideration of the range of the plaintiff's activities of daily living, her lack of mental health counseling and her irregular course of treatment with her treating internist. *See* Record at 15-16, 19. His analysis suffices to illustrate that his conclusion is supported by substantial evidence – *i.e.*, such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn.

2. **Cumulative Effect of Impairments**. As the plaintiff observes, *see* Statement of Errors at 2-5, an administrative law judge is obliged to consider the combined effect of non-severe as well as severe impairments, *see, e.g.*, 20 C.F.R. §§ 404.1545(e), 416.945(e) ("When you have a severe impairment(s), . . . we will consider the limiting effects of all your impairment(s), even those that are not severe, in determining your residual functional capacity."). She contends that the administrative law judge transgressed this requirement by failing to factor in any restrictions flowing from impairments he found non-severe solely on the basis of the finding of non-severity. *See* Statement of Errors at 3. I am unpersuaded. The administrative law judge both (i) discussed each alleged impairment in detail and (ii) made findings concerning pain and other symptoms the plaintiff alleged resulted from her collective impairments. *See* Record at 16-20 (discussing, *inter alia*, Exhibit 12E), 196-98 (Exhibit 12E, plaintiff's Report of Pain or Other Symptoms). That was all he was required to do.

3. **Weight Given to Non-Examining Consultant**. The argument of the plaintiff notwithstanding, *see* Statement of Errors at 11-12, the administrative law judge committed no error in choosing to credit the RFC assessment of a non-examining consultant (Dr. Chamberlin) over that of an

examining consultant (Gavin Ducker, M.D.). While it is true, as a general proposition, that opinions of examining sources are entitled to more weight than those of non-examining sources, *see* 20 C.F.R. §§ 404.1527(d)(1), 416.927(d)(1), this is but one of several factors relevant to evaluation of a medical opinion, *see id*. §§ 404.1527(d), 416.927(d), and an administrative law judge is entitled – indeed, obliged – to resolve conflicts in the medical evidence, *see, e.g.*, *Rodriguez*, 647 F.2d at 222 ("The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts."). Here, the administrative law judge considered both the Ducker and Chamberlin opinions and detailed his reasons for crediting one over the other. *See* Record at 20. No more was required.

4. **Credibility Determination**. The plaintiff complains that the administrative law judge wrongly assessed her credibility primarily on the basis of what he termed "her poor work record," failing to take into account other factors deemed relevant to credibility analysis. *See* Statement of Errors at 12-14; *see also* Social Security Ruling 96-7p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2004) ("SSR 96-7p"), at 137-38 (listing factors relevant to credibility analysis). This plaint is without merit. In a thorough discussion, the administrative law judge supplied several specific reasons for his credibility finding, each supported by a record citation (for example, that the plaintiff's manner of testifying, in which she tended to magnify her symptoms and minimize her abilities, cast doubt on her credibility). *See* Record at 18, 42 (plaintiff testified initially that she watched television "sometimes"; when pressed, stated she watched television two hours a day, including watching the evening news every night with her husband). His credibility findings accordingly are entitled to deference. *See, e.g., Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987) ("The credibility determination by the ALJ, who observed the claimant, evaluated his demeanor, and considered how that

testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings.").

5. **Pain Determination**. In her final statement of error, the plaintiff asserts that the administrative law judge failed to evaluate her subjective complaints of pain in accordance with the so-called *Avery* factors as set forth in *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 21 (1st Cir. 1986), and restated in 20 C.F.R. §§ 404.1529(c) & 416.929(c) and Social Security Ruling 96-7p. *See* Statement of Errors at 14-17. I discern no reversible error.

Avery instructs that an adjudicator "be aware that symptoms, such as pain, can result in greater severity of impairment than may be clearly demonstrated by the objective physical manifestations of a disorder." *Avery*, 797 F.2d at 23 (citation and internal quotation marks omitted). "Thus, before a complete evaluation of this individual's RFC can be made, a full description of the individual's prior work record, daily activities and any additional statements from the claimant, his or her treating physician or other third party relative to the alleged pain must be considered." *Id*. (citation and internal quotation marks omitted).

Consistent with *Avery*, the administrative law judge questioned the plaintiff extensively at hearing regarding, *inter alia*, her claimed pain and her activities of daily living. *See* Record at 28-43. He then went on, in his decision, to analyze in some detail why her activities (which included watching television for two hours a day, driving at least three to four times a week to the grocery store, playing cards with friends a couple of times a week and caring, with fairly minimal assistance, for her two small children) were inconsistent with complaints of disabling pain. *See id*. at 18. Pain determinations – like credibility determinations in general – are "entitled to deference, especially when supported by specific findings." *Frustaglia*, 829 F.2d at 195. That is the case here.

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and the case **REMANDED** for further proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 24th day of November, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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